IN THE

Supreme Court of the United States

October Term, 1920.

No. 84.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,

Appellant,

BRIEF

IN OPPOSITION TO THE PETITION.

JOSEPH P. COTTON,

THEODORE M. GORDON,

Solicitors for Some Plaintiffs-Appellees.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1920.

Original No. 24.

In re THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,

Petitioner.

BRIEF AGAINST THE PETITION FILED FOR RESPONDENT BY COUNSEL FOR BONA FIDE BONDHOLDERS.

This case arises on a petition for a writ of prohibition (or mandamus) directing the District Court of the United States, Northern District of Ohio, Western Division, not to proceed in a cause now before that Court, against the Chicago, Rock Island & Pacific Railway Company (herein called the Rock Island).

The petition and return differ as to very few facts but they differ very radically as to those facts and the differences are of first importance,—particularly as to whether the Rock Island is properly a party to the cause below and whether the relief sought against it is properly set up as a counterclaim.

The Allegations of the Petition.

The Ohio District Court in a proceeding in equity commenced by an Ohio creditor against an Indiana Railroad corporation, the Toledo, St. Louis & Western Railroad (herein called the Cloverleaf) has taken physical possession of the property of the embarrassed railroad in its District, and through a receiver is administering the property and adjudicating the claims of its creditors. The jurisdiction of the original proceeding is not challenged by the petitioner (see Petition for Writ, pp. 1, 2 and 3).

Among the claims filed against the property is an issue of $11,527,000 face amount of collateral trust bonds of the Cloverleaf which are alleged in default. The claim of these bonds is presented by cross-bills filed by a bondholders' committee (Merrill *et al.*) and by Central Trust Company of New York as trustee of the mortgage under which the bonds are issued (Petition, pp. 5 and 6).

The Cloverleaf in answer to the cross-bills sets up a defense to these bonds that they are void because they were obtained by the Rock Island Company by fraud. The petitioner does not challenge the jurisdiction of the District Court to determine whether this fraud constitutes a defense to the bonds (Petition, pp. 7 and 8).

This answer of the Cloverleaf (which is also called a cross-bill) also alleged that the Rock Island had entered its appearance in the cause, become a party to the cause, and rendered itself subject to the jurisdiction of the District Court and asked relief against the Rock Island Company, *i. e.*, that the Cloverleaf recover for the damages which it suffers as a result of the same fraud by

the Rock Island. The Cloverleaf answer, thus not only relied on the fraud as a defense to the bonds, but asked affirmative recovery from the Rock Island because of the fraud (Petition, pp. 9 and 10). Service of a copy of the answer was made upon the Rock Island as a party (*i. e.*, upon its solicitor, who also now appears for the Rock Island in this Court), and an order was entered requiring the Rock Island to reply to this answer (Petition, p. 10). The Rock Island moved to set aside the order and later moved to dismiss the claim made against it in the answer. Both motions were overruled by the District Court.

The Allegations of the Return Which Are Omitted from the Petition.

The Return sets out (pp. 8, 9, 10 and 11) that the Cloverleaf answer (or cross-bill) alleges that the Rock Island fraudulently by payment of a secret bribe to one of the Cloverleaf officers, caused the Cloverleaf to issue and deliver all the bonds in question, that the Rock Island disposed of all the bonds received by it except $5,447,000 face amount which were kept by it and are still owned by it, that $6,080,000 face amount are now held by holders who claim to hold such bonds in good faith and without notice of the fraud, and that the Cloverleaf asks (Return, p. 13) that all the bonds be declared void and (Return, p. 14) that it be compensated for the amount it has been and may be compelled to pay on these bonds, *i. e.*, the interest paid in the past and the amount it has to pay in the future on such bonds as are held by *bona fide* holders for value (all such damages whether past or future resulting from the same fraud of the Rock Island).

The Return sets out (p. 21) that the reply filed by the Rock Island to the answer (or cross-bill) of the Cloverleaf admits that $5,447,000 face amount of the bonds were at all times owned by the Rock Island up till 1914, when they were deposited with the Merrill Committee. The Merrill Committee were as the return (pp. 2, 3) shows merely a committee to enforce the bonds for the benefit of the Rock Island and the other depositors.

While the Return does not in such terms so allege it is clear from the facts thus stated that, to the extent of its bondholdings, the Rock Island was the real party in interest in the proceedings brought by the Merrill Committee and by the Trustee of the mortgage.

The most striking difference between the petition and the return is on the point of whether or not the Rock Island is a party to the creditors' bill.

The Return sets out

(*a*) that the Cloverleaf's answer (or cross-bill) alleges that the Rock Island had intervened in its own right and had become a party to the cause (Return, p. 12);

(*b*) that on hearing such answer evidence was introduced to prove such allegations (Return, p. 15) and the answer was filed and notice duly given to its solicitor, and service of such notice admitted by its solicitor as such (Return, pp. 16, 17).

(*c*) that such evidence was further considered by the District Court and

"From said evidence the court in the exercise of its judicial discretion found that the Chicago, Rock Island & Pacific Railway Company had entered its appearance in and had become a party to said cause and had

fully submitted itself to the jurisdiction of said court for all proper purposes as a party thereto" (Return, pp. 16, 17).

and the court then entered an order embodying this finding, and on new motions by the Rock Island the Court again heard evidence on the point and overruled the objection of the Rock Island (Return, pp. 18, 19, 20).

(*d*) The Return states categorically (p. 21) that the evidence upon which the Court so acted (in holding the Rock Island a party) is not set out in the petition, that the statement in the petition as to the basis or reason of such ruling is incorrect and does not show all the evidence before the Court, and (Return, p. 22) that petitioner took no steps to have certified a record of the evidence submitted on said hearings, nor to review such orders on appeal or error proceedings.

This Court Will Dismiss the Petition for the Writ.

On the record as above stated by which it appears that the determination by the District Court that the Rock Island was a party, was made on evidence of which no record is before this Court—this Court may not on this application review the correctness of the determination. Since the evidence is not before this Court, this Court cannot reach the conclusion that the District Court was incorrect in its determination. *In re Cooper*, 143 U. S. 472, 506, 507.

Assuming, then, for the purposes of this hearing, that the Rock Island was a party to the main cause, it must follow that in accordance with the Equity

Rules the counterclaim of the Cloverleaf for affirmative relief against the Rock Island must be within the jurisdiction of the District Court (entirely without regard to citizenship of the two corporations or whether the District Court would have had original jurisdiction of the claim which is now asserted as a counterclaim) and the procedure was correct.

Thus the Second Paragraph of Equity Rule 30 provides:

> "The answer must state in short and simple form *any counterclaim arising out of the transaction which is the subject matter of the suit*, and may, without cross bill, set out any set-off or counterclaim against the plaintiff which might be the subject of an independent suit in equity against him, and such set-off or counterclaim, so set up, shall have the same effect as a cross suit, so as to enable the court to pronounce a final judgment in the same suit both on the original and cross claims."

Rule 31 in part provides:

> "If the answer include a set-off or counterclaim the party against whom it is asserted shall reply within ten days after the filing of the answer, unless a longer time be allowed by the court or judge. If the counterclaim is one which affects the rights of other defendants they or their solicitors shall be served with a copy of the same within ten days from the filing thereof, and ten days shall be accorded to such defendants for filing a reply."

Rule 37 in part provides:

> "Every action shall be prosecuted in the name of the real party in interest, but an executor, administrator, guardian, trustee of an express trust * * * may sue in his own name without joining with him the party for whose benefit the action is brought. All per-

> sons having an interest in the subject of the action and in obtaining the relief demanded may join as plaintiffs, and any person may be made a defendant who has or claims an interest adverse to the plaintiff."

And again:

> "Any one claiming an interest in the litigation may at any time be permitted to assert his right by intervention, but the intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding."

It is quite clear that this counterclaim of Cloverleaf against Rock Island (concerning which the writ is now asked) is one (in the language of Equity Rule 30 above quoted) "arising out of the transaction which is the subject matter of the suit," and ancillary to the main proceedings by creditors. The suits brought by the Merrill Committee and the Trustee of the mortgage to enforce the bonds (which were certainly brought in the interest of Rock Island) necessarily had as their subject matter the fraud which is urged as a defense to the bonds and the *bona fides* of the bondholders, which is the answer to the fraud, and that same fraud and the disposal of the same bonds by Rock Island to *bona fide* holders is the basis of the Cloverleaf's counterclaim. Nor can there be any doubt that the practice in giving notice to the Rock Island (which has since filed an answering pleading) is correct.

But if this Court were in doubt as to the correctness of the determinations of the District Court —nevertheless it is submitted that this Court may not grant the writ of mandamus. The questions as to whether the Rock Island was properly a party, as to whether this was a "counterclaim", and as to whether the practice was correct, were jurisdic-

tional questions depending on the evidence presented. The District Court had the right to hear such evidence and reach a determination as to whether or not it had jurisdiction—and its determinations, completely reviewable by error proceedings, may not be questioned by writ of prohibition or mandamus,—particularly where the evidence is not before the Court.

The Petitioner's Contentions.

The petitioner contends (see his Brief, p. 2) that the petitioner has no adequate remedy except by writ of mandamus, quoting *In re Winne*, 213 U. S. at page 467, as follows:

> "An appeal or writ of error, at the end of long and expensive proceedings, which must go for naught if the District Court is without jurisdiction, is not an adequate remedy."

That authority is expressly disapproved by a later decision of this Court in *Ex parte Harding*, 219 U. S. 363.

The discretion of this Court to issue a writ of prohibition or mandamus will not be exerted to review the question of jurisdiction where there is otherwise adequate remedy by appeal or writ of error. *Ex parte Nebraska*, 209 U. S. 436; *Ex parte Harding, supra; Ex parte Oklahoma*, 220 U. S. 191, 209; *Ex parte Tiffany*, 252 U. S. 32, 37.

And the power to issue the extraordinary writ of prohibition or mandamus is only exerted when it is clear that the Court whose action it is sought to prohibit had no jurisdiction of the cause. *In re Huguley Mfg. Co.*, 184 U. S. 293, 301.

On these authorities we deem it clear that this Court will not by writ of prohibition or mandamus

review the questions of fact (determined upon evidence by the District Court) whether the petitioner did become a party to the cause and/or whether the action against him be properly a counterclaim—much less will this Court by such writ review the proceedings of the District Court where the evidence on which the determination of the District Court was made is not before it.

The petitioner also relies in support of his contentions on the case of *Merriam* v. *Saalfield*, 241 U. S. 23. We submit that that case is not authority for the plaintiff's contention and that it does not present a parallel case.

The *Merriam* case arose on appeal from a District Court. The question before this Court was as to the jurisdiction of the District Court to make and enforce a final decree *in personam* against one Ogilvie. An original bill had been filed by plaintiff against one Saalfield for relief against unfair competition and a decree was entered against Saalfield with an order of reference for accounting. Thereafter a supplemental bill was filed setting up that Ogilvie had actually directed Saalfield's defence through his own counsel and that pending the litigation Saalfield had assigned his business to a corporation, and by reason of such facts Ogilvie became an actual though not nominal party to the suit. Substituted service was made on the counsel who had appeared for Saalfield but who were alleged to have been employed by Ogilvie. A decree *pro confesso* was entered against Ogilvie for recovery of profits. He then appeared specially moving to quash the service of the writ of subpœna and to set aside all proceedings based thereon, and that motion was granted by the District Court, and it was from the granting of that motion that the appeal was taken.

This Court affirmed the correctness of the ruling of the District Court in its order on that motion.

The opinion of this Court assuming that the decree against Saalfield was final (p. 29) pointed out that the sufficiency of the proceedings by substituted service depended upon whether the supplemental bill was a "dependent" or "ancillary" bill, the jurisdiction of which followed the jurisdiction of the original cause. This Court pointed out that Ogilvie was not a party to the record, nor did the fact that he had taken charge of Saalfield's defence put him in a position where he could be treated as an actual party, and decided that the supplemental bill was not "dependent upon" or "ancillary to" the original suit against Saalfield, saying (p. 30):

> "But the merits are not to be adjudicated against him until he is brought into a Court and as against him the supplemental bill is an original not an ancillary proceeding."

And at page 31 this Court said:

> "No case to which we are referred, nor any other that we have found, goes to the extent of sustaining as an ancillary proceeding a bill interposed for the purpose of obtaining a decree *in personam* against a party on the ground that he had participated in the defence of a previous action against another party so as to become bound upon the doctrine of *res judicata*."

It is submitted the *Merriam* case is, both as to the precise facts and as to the reasoning of the Court, entirely distinguishable.

(1) In the case at bar the person over whom jurisdiction is claimed became a formal party. And the failure of that fact in the *Merriam* case was

given by this Court (p. 29 of their opinion) as a reason for their decision that the District Court had not jurisdiction.

(2) In the *Merriam* case the third party Ogilvie had never made any affirmative claim for relief and his activity was purely defensive. In the present case the Rock Island, through the bondholders' committee and the trustee of the mortgage, instituted and engaged in proceedings for the enforcement of their bonds.

(3) In the *Merriam* case the action against Ogilvie was not "ancillary" or "dependent" upon the action against Saalfield, although it arose out of the same state of facts. In the present case the action against the Rock Island is "ancillary" or "dependent". That a proceeding by way of counterclaim is "ancillary" or "dependent" upon the main proceeding so that it may be maintained in the Federal Court (even although as an original proceeding the Federal Court would not have had jurisdiction over it) has been precisely decided by this Court in *Deucy* v. *West Fairmont Gas Coal Co.*, 123 U. S. 329, 333. And this Court has also decided that where a creditor's suit has been commenced and the assets of a corporation are in the hands of the Federal Court for administration for the benefit of its creditors, that Court has jurisdiction to proceed to collect claims owing to the corporation (although such claims be claims of which that Court would not have had jurisdiction if they had been original proceedings), and such proceedings for the collection of claims have been termed by this Court "ancillary" to the main proceedings (see *White* v. *Ewing*, 159 U. S. 36, 39).

(4) The Equity Rules above quoted expressly provide for assertion of counterclaims in equity causes pending in the Federal Courts by substituted service, thereby in effect classifying counterclaims arising out of the same transaction as "dependent".

It is submitted therefore that *Merriam* v. *Saalfield* is not an authority for the petitioner's contention.

The truth is that the only difference between the counterclaim against the Rock Island in the present case and any other counterclaim is that the record before this Court does not show that the Rock Island ever filed a pleading entitled in its own name setting out the state of facts on which it asked affirmative relief. But the record does show that such a proceeding was filed in its behalf by the Merrill committee and again by the trustee of the mortgage, both for affirmative relief for the benefit of the Rock Island, and that the Rock Island became a formal party for the assertion of its rights in the District Court, and under such circumstances the Rock Island may not be heard—least of all in this proceeding—to hold this technicality as a shield against answering for its fraud.

This brief is filed for the respondent by counsel employed by the Merrill Committee of Bondholders to represent the interest of depositors whose bonds (known as Series A bonds) were acquired before maturity for value and without notice of the alleged fraud of the Rock Island Company. This is the same Committee which holds the bonds owned and deposited by the Rock Island Company.

J. P. Cotton,
T. M. Gordon,
Solicitors.